

Issue 1 -- Possible conflict between the ADA, its principles and open source policies

We have seen the Government object to certain open source licenses on the basis that license provisions violate the Antideficiency Act (ADA). In such a case, there is a possible conflict between the Antideficiency Act and the policy to promote the use of open source in the Department of Defense. One example is the Apache 2.0 open source license, which according to Wikipedia covers over 6000 open source projects located on the Sourceforge.net repository.

See http://en.wikipedia.org/wiki/Apache_License http://en.wikipedia.org/wiki/Apache_License . This license also covers the Apache Web Server, which is a popular operating environment for hosting websites. The Government's objection to the Apache license is based on paragraph 9, which provides that the licensee indemnifies the developer in certain circumstances. The Principles of Federal Appropriations Law, Third Edition, Volume II at 6-59 to 6-93 discusses in detail indemnification agreements and the ADA concluding:

"The problem is that [indemnification agreements] create a risk that the government, at some point in the future, may have to pay amounts in excess of available funds. Consequently, with on very limited exception discussed below, GAO and numerous courts have adhered to the rule that, absent express statutory authority, the government may not enter into an agreement to indemnify where the amount of the government's liability is indefinite, indeterminate, or potentially unlimited. Such an agreement would violate the Antideficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11, since it can never be said that sufficient funds have been appropriated to cover the government's indemnification exposure."

Principle of Federal Appropriations Law, Third Edition, Volume II, p. 6-59 to 6-60.

Making the indemnity capped or subject to available funds is not possible without negotiating with the author, which defeats in part the purpose of open source software -- to make software free and easy to use.

Other provisions to which the Government has objected include attorneys fees provisions, which provide that the losing party pays the prevailing party's attorneys fees and choice of law provisions that specify forums in which the government may not be sued.

Without guidance on what popular open source licenses are acceptable to the Government generally, the contractor presently takes a risk that the open source software incorporated in government deliverables may not be acceptable to the government.

While it is possible to gain the Government's agreement to certain licenses prior to commencing development, this may not be possible when GOTS code is reused by the Contractor or provided by as GFI by the Government or when a contractor develops COTS software that meets the definition of "commercial computer software" in the procurement regulations.

Issue 2 -- Export Control

Certain licenses such as the GPL and LGPL provide that a licensee redistributing the open source library may not impose further restrictions on the recipient. For example, the LGPL 2.1 license provides: "You may not impose any further restrictions on the recipients' exercise of the rights granted herein. You are not responsible for enforcing compliance by third parties with this License."

There is a question as to whether or not the imposition of export control restrictions is a "further restriction" on the recipient or merely a covenant to "obey the law."

This affects contractors selling to government recipients as well as non-governmental recipients